

EMPLOYMENT AGREEMENTS: NOT ALWAYS EXPIRED, ESPECIALLY IN TRANSACTION SETTING

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One of the perceived benefits for employers of employment agreements is that they can save on severance costs. Indeed, fixed term employment agreements are often used to reduce, eliminate or provide certainty about the requirement to pay severance upon termination. However, as the recent decision of the Ontario Superior Court of Justice in *Roberts v ZoomerMedia Ltd.* 2016 ONSC 2426 illustrates, the actual conduct of parties to employment relationships will be crucial to determining legal obligations.

In 2007, Bill Roberts entered into an employment agreement with his employer, Vision TV, for a fixed term ending on October 31, 2011. This agreement also provided that Roberts was to receive two years' worth of salary at the end of the term of the contract, as well as a \$150,000 sabbatical payment should his employment be extended beyond the end of the term. In 2009, the agreement was amended, and Vision TV and Roberts agreed that he would be entitled to a lump sum payment of two years's salary (\$490,000) upon termination or upon expiration of the term of the employment agreement.

Soon after the agreement was amended, Vision TV was acquired by ZoomerMedia Inc. ("Zoomer"). As part of the purchase agreement, Zoomer agreed to an assignment of the Roberts employment agreement as amended. Roberts then proceeded to begin working for Zoomer without any changes to his compensation.

Negotiations for an extension of the term of the employment agreement then ensued. The parties were, however, unable to agree to binding terms. Roberts worked past the October 31, 2011 contract term expiry.

While negotiations continued, Zoomer argued that the Roberts should not be entitled to benefits under the original employment agreement. At this time, upset that his severance and other contractual obligations were apparently being ignored, he threatened legal proceedings on a claim of severance and the sabbatical payments.

In response, Zoomer encouraged further negotiations in lieu of litigation, assuring the plaintiff of a deal that would include a two-year severance payment. On March 1, 2012, Zoomer instead terminated the plaintiff's employment without cause, and argued that Robert should be entitled only to notice in accordance with the common law for wrongful dismissal cases (which would have been less than half of what was payable under

the contract, and would have been subject to mitigation).

At issue in this case was whether a common law employment relationship negated the employment agreement, and in particular the termination provisions. Zoomer claimed that the employment agreement was null and void as the parties had not entered into a new formal agreement at the end of the original term (October 31, 2011). Roberts countered that the amended employment agreement, which had been assigned to Zoomer, provided that the two year lump sum severance payment was due upon termination of employment and not just expiry of the term.

In coming to a summary judgment decision awarding Roberts the lump sum severance amount and the sabbatical payment as provided for in the employment agreement, Justice Perell considered the scope of negotiations and the inherent relationship of the parties. As the employment agreement had not been discharged, the Court held that Zoomer was bound to pay the amounts owing under the agreement which Zoomer had assumed.

Takeaway for Employers

This decision confirms the importance of a careful review of severance provisions in employment agreements. The Courts have in recent years repeatedly stressed the importance that employers "get it right" when attempting to limit amounts payable to employees. For this reason, employers must be alive to contract terms and entitlements provided therein, even in cases where there is a possible argument that the employment contract is extinguished. For those advising on employment issues in transactions, this decision also provides caution about the implications of simply assuming a contract as opposed to using the opportunity to negotiate.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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